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(30,521)

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 556 146

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

*vs.*

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

## REPLY TO BRIEF OF DEFENDANTS IN ERROR.

CHARLES F. FAWSETT,
*Counsel for Plaintiffs in Error.*

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## REPLY TO BRIEF OF DEFENDANTS IN ERROR.

Solely with the view to pointing out the respects in which the brief for the state of Wisconsin seems to confuse the issue and may therefore possibly be misleading, we ask the privilege of filing this reply brief.

We are unable to understand from the state's brief whether counsel accepts the construction placed on the statute in question by the opinion and decision of the state court here under review, or whether he is relying on the grounds of the decision upon which the statute was sustained in the previous case of *Estate of Ebeling*, 169 Wis. 432.

As the construction placed on the statute in the case under review is materially different from the grounds on which the statute was sustained in the *Ebeling* case, it is my understand-

ing that the construction placed upon the statute in this case supersedes the grounds of the decision in the *Ebeling* case in so far as the two are different or inconsistent.

The grounds upon which the statute was sustained in the *Ebeling* case are stated in the opinion as follows:

> "It is said that the legislature cannot declare a gift to be in contemplation of death when it in fact is not so. It is admitted, however, that the legislature may tax gifts *inter vivos*. Whether these gifts, therefore, be held to be gifts in contemplation of death or gifts *inter vivos*, they are not beyond the power of the legislature to tax. If they be considered gifts *inter vivos* there is abundant justification for the classification here made in segregating them from other gifts *inter vivos* as objects of taxation, the basis for such classification being the purpose to make the law taxing gifts made in contemplation of death effective." (196 Wis. p. 436)
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> 169

In the case here under review, when the case was before the State Court, that court was asked to reconsider the grounds of the decision in the *Ebeling* case and to overrule that decision (Rec. 43). As indicated by the opinion, the court did reconsider the grounds of the decision in the *Ebeling* case, and while it did not overrule the decision it materially modified the grounds upon which it was based *and adopted a construction of the statute which is directly opposed to the ground on which it was sustained in the Ebeling case.*

As indicated above, in the *Ebeling* case the court entirely avoided the question whether the legislature has the power to establish by arbitrary declaration a gift to be made in contemplation of death for the purposes of an inheritance tax when in fact it is not so made, by holding in that case that the statute could be sustained by considering it as imposing the tax on a certain class of gifts *inter vivos* as such, as well as upon gifts made in contemplation of death.

When the case *here under review* was before the state court the ruling of the court in the *Ebeling* case that the statute could be sustained as a tax on gifts *inter vivos* as a separate class *in conjunction* with the tax on gifts made in contemplation of death, was the main point of the attack on that case.

In the opinion in this case, the court while adhering to the decision in the *Ebeling* case reverses or corrects the ground upon which that case was decided, in the following language:

"The second objection that the basis of classification was wrong because there are two classes, one of gifts made in contemplation of death, and another of gifts made within six years though not in contemplation of death, misinterprets the legislative intent. Such intent was to tax only gifts made in contemplation of death. That is the only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death, bringing such gifts within the only class created, namely gifts made within contemplation of death. Waiving the question of whether the legislature could bring gifts made within six years within the class, it is quite obvious that only one class is created and that a valid one, for gifts made in contemplation of death stand upon a different basis than ordinary gifts made *inter vivos*." (Rec. 44, 45)

"We agree with the applicants that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event." (Rec. 47)

This court is bound by the meaning and construction thus given to the statute by the State Court. *Stebbins vs. Riley*, 45 S. C. R. 424 at p. 427.

In the subsequent reasoning of the court, the grounds of the decision in the *Ebeling* case were sustained only in so far as it held the statute to create a conclusive presumption or rule of construction and not merely a rebuttable presumption. It thus seems apparent as pointed out in our principal brief, that as finally construed by the state court, the statute creates but one class of gifts *inter vivos* for the purpose of the tax, and that is, gifts made in contemplation of death; that the tax is imposed *as an inheritance tax* and not as a tax on a certain class of gifts *inter vivos* segregated from other gifts *inter vivos* as objects of taxation regardless of whether made in contemplation of death or not; and that the ground upon which the power of the legislature to impose the tax on such gifts is that the tax imposed is "*a tax upon the right to receive property from a decedent.*" (Rec. 44)

This would seem to bring us face to face with the first question discussed at length in our principal brief, namely, whether the legislature has the power by its mere fiat to declare that a

large class of gifts which were not in fact made in contemplation of death were so made for the purpose of imposing upon them *an inheritance tax* the same as is imposed on gifts in fact made in contemplation of death.

Counsel for the state does not meet this question. On the question of classification the state seems to rest its case entirely on an extract from a recent opinion of this court in which it is said:

> "It is not necessary that the basis of the classification should be deducible from the nature of the thing classified. It is enough that the classification is reasonably founded in the purposes and policies of taxation." (*Stebbins vs. Riley*, 45 S. C. R. at p. 426.)

The only attempt that is made to show that the classification in this case is *reasonably founded* in the purposes and policies of taxation is a reiteration of the statement in the opinion of the ~~trial~~ court that the purpose of the statute was to relieve the state from the necessity of making proof of the fact that a gift was made in contemplation of death in all cases where the donor happens to die within six years after making the gift, coupled with the surprising assertion that the average citizen and those whom he leaves behind when he dies are so dishonest that nothing short of a conclusive presumption will make it possible for the state to collect the tax on gifts actually made in contemplation of death.

This does not seem to involve any policy of taxation but rather a policy of distrust of the honesty of the average citizen. I hope that this court will not feel bound by either the opinion of counsel for the state or of the legislature of the state of Wisconsin on that subject.

We do not understand that in the use of the language above quoted this court intended to announce any new principle. As we understand it, the language referred to was directed to *the basis of the classification* and was not intended to be all inclusive and to cover the entire subject of the requisites of a valid classification. We do not understand that the general principles by which this subject is governed are now open to controversy in this court. According to these principles as we understand them, in addition to a proper *basis of classification* there are other requisites to make the classification a valid one. One of such other requisites is that all of the members of the class made subject to the tax must be properly related to the basis of the classification.

In this case we have no fault to find with the basis of the classification, if we are correct in understanding the state court to finally hold *that it is confined to gifts made in contemplation of death.*

The objections here raised are, that the statute prior to the amendment having established that basis of classification which is an entirely proper one, *deducible from the nature of the things classified*, the amendment arbitrarily imports into it cases which are directly opposed to the basis of classification; and to make the matter worse, makes a purely arbitrary and capricious selection of the cases so improperly imported while leaving out all other cases of the same kind as those which are brought in. There is apparently no answer to these objections in the brief of counsel for the state.

Respectfully submitted,

CHARLES F. FAWSETT,
*Counsel for Plaintiffs in Error.*

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*vs.*

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES

## COPY OF PROVISIONS OF WISCONSIN INHERITANCE TAX STATUTES RELATING TO RATES.

CHARLES F. FAWSETT,
*Counsel for Plaintiffs in Error.*

(Burdick-Allen Company)

# (30,521)

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IN ERROR TO THE SUPREME COURT OF THE UNITED STATES

## COPY OF PROVISIONS OF WISCONSIN INHERITANCE TAX STATUTES RELATING TO RATES.

Upon the oral argument of the above case, the Chief Justice requested that the court be furnished with a printed copy of the entire provisions of the Inheritance Tax Statutes of Wisconsin relating to rates. The following copy of the Statutes is in compliance with that bequest.

The above named decedent died January 3, 1921. At that time, the Statutes in relation to the matter of rates in force as shown by *Wisconsin Statutes*, 1919, Chapter 64ff., were as follows:

> "*Subjects Liable.* Section 1087-1. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, associa-

tion or corporation, except county, town or municipal corporations, within the state for strictly county, town or municipal purposes, and corporations of this state organized under its laws or voluntary associations organized solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

* * * *

*Primary Rates, where not in excess of twenty-five thousand dollars.* Section 1087-2. When the property or any beneficial interest therein passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in section 1087-4, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

*One per centum, where.* (1) Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue, lineal ancestor of the decedent or any child adopted as such in conformity with the laws of this state, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter, or any lineal issue of such adopted or mutually acknowledged child, at the rate of one per centum of the clear value of such interest in such property.

*Two per centum, where.* (2) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of the decedent, a wife or widow of a son, or the husband of a daughter of the decedent, at the rate of two per centum of the clear value of such interest in such property.

*Three per centum, where.* (3) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the decedent, at the rate of three per centum of the clear value of such interest in such property.

*Four per centum, where.* (4) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother or a descendant of the brother or sister of the grandfather or grandmother of the decedent, at the ate of four per centum of the clear value of such interest in such property.

*Five per centum, where.* (5) Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, at the rate of five per centum of the clear value of such interest in such property.

*Other rates, where in excess of twenty-five thousand dollars.* Section 1087-3. The foregoing rates in section 1087-2 are for convenience termed the primary rates.

When the amount of the clear value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

*Rate where amount twenty-five thousand dollars to fifty thousand dollars.* (1) Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars two times the primary rates.

*Rate where amount fifty thousand dollars to one hundred thousand dollars.* (2) Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars three times the primary rates.

*Rate where amount one hundred thousand dollars to five hundred thousand dollars.* (3) Upon all in excess of one hundred thousand dollars and up to five hundred thousand dollars four times the primary rates.

*Rate where amount over five hundred thousand dollars.* (4) Upon all in excess of five hundred thousand dollars five times the primary rates.

Tax not to exceed fifteen per cent. (5) No such tax, however, shall exceed fifteen per cent of the property transferred to any beneficiary."

At the bi-annual session of the legislature which convened in January, 1921, *the rates as shown by chapter* 72 *Wisconsin Statutes* 1921, *were increased as follows*:

"72.02 *Primary rates, where not in excess of twenty-five thousand dollars.* When the property or any beneficial interest therein passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in section 72.04, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

(1) *Two per centum, where.* Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue, lineal ancestor of the decedent or any child adopted as such in conformity with the laws of this state, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter, or any lineal issue of such adopted or mutually acknowledged child, at the rate of two per centum of the clear value of such interest in such property.

(2) *Four per centum, where.* Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of the decedent, a wife or widow of a son, or the husband of a daughter of the decedent, at the rate of four per centum of the clear value of such interest in such property.

(3) *Six per centum, where.* Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the decedent, at the rate of six per centum of the clear value of such interest in such property.

(4) *Eight per centum, where.* Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, at the rate of eight per centum of the clear value of such interest in such property.

72.03. *Other rates, where in excess of twenty-five thousand dollars.* The foregoing rates in section 72.02 are for convenience termed the primary rates. When the amount of the clear value of such property or in-

terest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

(1) *Rate where amount twenty-five thousand dollars to fifty thousand dollars.* Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars two times the primary rates.

(2) *Rate where amount fifty thousand dollars to one hundred thousand dollars.* Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars three times the primary rates.

(3) *Rate where amount one hundred thousand dollars to five hundred thousand dollars.* Upon all in excess of one hundred thousand dollars and up to five hundred thousand dollars four times the primary rates.

(4) *Rate where amount over five hundred thousand dollars.* Upon all in excess of five hundred thousand dollars five times the primary rates."

*The limitation of the maximum tax to fifteen per cent in the previous law was repealed by Chapter 568 of the laws of 1921.*

CHARLES F. FAWSETT,
*Counsel for Plaintiffs in Error.*